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A Solution to the Exempt Well Problem? The New Role of Counties in Determining Legal Water Availability in Washington State

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A SOLUTION TO THE EXEMPT WELL PROBLEM? THE NEW ROLE OF COUNTIES IN DETERMINING LEGAL WATER AVAILABILITY IN WASHINGTON STATE

Jeremy Lieb

ABSTRACT: Washington, like most western states, exempts domestic groundwater use from water rights permitting requirements. The cumulative impact of exempt groundwater use threatens senior water rights and protected stream flows in certain arid parts of the state that have seen significant ex-urban and suburban development. Exempt domestic wells, however, are only exempt from requirements to obtain a permit and are still subject to regulation under the principles of prior appropriation; exempt well users can be forced to curtail their water use in order to satisfy the full extent of a senior water right. In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, the Washington State Supreme Court held that county comprehensive plans must not allow evasion of water permitting requirements through the use of exempt wells. The Court clearly suggested that counties have an affirmative duty to ensure that applicants seeking permits to build or develop land have a legally adequate supply of water available. Some commentators express concerns regarding whether this is an appropriate role for counties to play in water management. This Comment argues that requiring counties to ensure the legal adequacy of a proposed water source when permitting development may actually provide an effective means to regulate exempt wells where their cumulative impact is significant. Counties are equipped to determine whether a permit applicant has access to a legal water source. The apparent regulatory structure following *Kittitas County* allows the Washington Department of Ecology to determine whether to close basins off for new withdrawals and for Ecology or some other expert entity to handle the details of administering mitigation banks, while the counties will be responsible for ensuring compliance by adding a small step to an existing permitting process.

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I. INTRODUCTION

All but two of the eighteen member states in the Western States Water Council exempt certain groundwater uses from water rights permitting procedures, adjudication, or both.¹ There is considerable variation between the states regarding the specific quantity and uses of water that may be withdrawn without a permit, but the laws share a common basic rationale and generally include exemptions for small domestic and stock water uses.² Two underlying assumptions provide the rationale for the exemptions: (1) the amount of water withdrawn by such small users is minor relative to available groundwater, and (2) requiring full compliance with permitting requirements would be unduly burdensome to both the user and the state regulatory authority.³ But the truth of these assumptions has been called into question in recent decades, as concerns have begun to grow in most states over cumulative impacts of exempt wells.⁴ It has become quite clear that cumulative use of exempt wells can threaten senior surface or groundwater rights, surface stream flows, and aquifers, particularly in basins that are “closed” to new permitted surface or groundwater withdrawals.⁵

Much has been written about the current regulatory issues associated with, and potential solutions for, exempt wells in the western United

1. Nathan Bracken, *Exempt Well Issues in the West*, 40 ENVTL. L. 141, 150 (2011).

2. *Id.*

3. Drew Kershan, *Domestic Well Exemption in Oklahoma Groundwater Law—Impact and Implications*, 64 OKLA. L. REV. 563, 564 (2012).

4. *See* Bracken, *supra* note 1, at 195–201.

5. *Id.* at 199.

States.⁶ Despite this attention, states have taken little formal action to address the problem. A recent challenge to county zoning regulations in Washington State and the resulting Washington State Supreme Court decision point toward an effective potential solution to problems regarding cumulative impacts of exempt wells. This Comment examines the effect of the Washington State Supreme Court's decision in *Kittitas County v. Eastern Washington Growth Management Hearings Board* and whether resulting regulatory developments could effectively bring exempt wells in priority areas within regulatory control without unduly burdening landowners or state authorities.

In *Kittitas County*, the Court held that Kittitas County's subdivision regulations could not permit "subdivision applications that effectively evade compliance with water permitting requirements."⁷ In an earlier opinion, the Court held that exempt wells could not be used to serve individual homes or small groups of homes within a subdivision development.⁸ Instead, the total water use of any development intending to utilize the domestic use exemption from groundwater permitting requirements must meet a 5000 gallon per day quantity requirement.⁹ At issue in *Kittitas County* was whether counties could nevertheless allow developers to divide up proposed subdivisions and submit multiple applications as a way of circumventing this requirement.¹⁰ The Court held that Washington's Growth Management Act requires county regulations to ensure that developers cannot evade state water law in this manner.¹¹ The Court suggested that to ensure compliance with water permitting requirements, counties are responsible for determining whether water is both legally and physically available before permitting subdivision development.¹² The Court, however, provided no guidance as to what a county actually must do to determine if water is legally available.

Some observers suggest that *Kittitas County* conclusively established that counties must determine whether water is legally available before

6. *Id.* at 195–201 (provides a comprehensive discussion of the issues facing western states as a result of permit-exempt wells).

7. *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wash. 2d 144, 181, 256 P.3d 1193, 1210 (2011) (citing WASH. REV. CODE § 58.17.110(2) (2012)). Kittitas County is a county in central Washington State located on the east slopes of the Cascade Mountains, directly east of King County and about eighty miles east of Seattle.

8. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash. 2d 1, 12–14, 43 P.3d 4, 10–11 (2002).

9. *Id.*

10. *Kittitas Cnty.*, 172 Wash. 2d at 175–79, 256 P.3d at 1208–10.

11. *Id.* at 177–81, 256 P.3d at 1209–10.

12. *See id.*

permitting development. This means that use of a proposed water source will meet the requirements of the state's surface water or groundwater codes.¹³ Others argue that counties need to be concerned only with the Court's narrow holding, requiring counties to ensure that subdivision permit applicants are not circumventing the groundwater code's permitting requirements by submitting separate subdivision applications for multiple adjacent subdivisions under common ownership.¹⁴ The *Kittitas County* holding is indeed narrow, but the Court strongly implies that a county must still determine whether any proposed land use will comply with applicable water permitting laws.¹⁵ In the situation where a permit applicant seeks to use an exempt well, the county's responsibility appears to be twofold: (1) requiring that the applicant will meet the use and quantity requirements for a permit exemption, and (2) to the extent the county has authority to do so, ensuring new exempt well use will not impair senior users or protected stream flow.

Requiring counties to ensure that developers have secured a legal source of water may provide a means to effectively regulate exempt wells where the cumulative impact is significant. To comply with this requirement, counties need only add a single step to the existing permitting process. Adequate information exists to determine whether water is legally available, information that can be accessed by permit applicants or county staff without specialized technical knowledge. Where an applicant proposes to use a permitted surface or ground water source, the applicant will simply need to provide the county with proof of a valid right or claim. Where an applicant proposes to use a permit exempt well, the county will need to ensure that proposed use meets the use and quantity requirements for the exemption, but the determination of whether water is available for new exempt wells can be left to the Washington State Department of Ecology (Ecology). If Ecology has determined that a basin must be closed to new withdrawals, a developer

13. Letter from EarthJustice to King County Directors of Development and Environmental Services and Department of Natural Resources & Parks, and to the Director of Public Health Seattle & King County (Sept. 14, 2011) (*on file with Journal*) [hereinafter EarthJustice Letter].

14. Reinert, Presentation at Washington Water Law & The Public Trust Conference: Aftermath of *Kittitas County v. EWGMHB*—Water Availability Determinations at the Local Level: One County's Perspective (December 9, 2011). The Court previously held that the total groundwater use of a subdivision must be considered in determining whether use of the subdivision fits within the domestic well exemption from permit requirements, which limits the total daily withdrawal from exempt domestic wells to 5000 gallons per day. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash. 2d 1, 15, 43 P.3d 4, 12 (2002). A subdivision developer could theoretically evade this requirement by filing separate applications for multiple units within a subdivision that were each within 5000 gallons per day limit.

15. *Kittitas Cnty.*, 172 Wash. 2d at 177–81, 256 P.3d at 1209–10.

in that basin will need to provide the county with proof of adequate mitigation water. Mitigation banks facilitate purchase of existing water rights to be left in stream to offset new uses, and are already being developed in closed basins throughout the state to address this.

II. HISTORY AND BACKGROUND

A. *Water Rights Permitting in Washington*

Washington did not adopt a comprehensive water management code until 1917.¹⁶ Before the code was adopted, common law along with territorial and state statutes governed Washington water rights.¹⁷ Courts recognized both riparian and prior appropriation systems of water law.¹⁸ Territorial courts recognized and enforced “community custom” as supporting principles of prior appropriation.¹⁹ Under the riparian doctrine, riparian property owners have a right to reasonable use of water that flows through or along their property.²⁰ Riparian water rights are tied to land ownership and there is no requirement that the water be used for the right to be maintained.²¹ Prior appropriation, by contrast, separates water rights from land ownership. Priority of use is determined by the date of water appropriation, and beneficial use must be continued in order to maintain the right.²² Under prior appropriation, senior users may continue to use all of their water right in times of shortage to the complete exclusion of junior users.²³ This sharply contrasts with the

16. CHRISTINE O. GREGOIRE, JAMES K. PHARRIS & P. THOMAS McDONALD, AN INTRODUCTION TO WASHINGTON WATER LAW II: 16 (2000).

17. *See generally id.* at II:1–16.

18. *See, e.g.,* Tenem Ditch Co. v. Thorpe, 1 Wash. 566, 568, 250 P. 588, 589 (Wash. Terr. 1889) (noting that rights of prior appropriators, as recognized by custom, are superior to the rights of a later appropriator regardless of the latter’s riparian land ownership); Geddis v. Parrish, 1 Wash. 587, 591, 21 P. 314, 315 (Wash. Terr. 1889) (holding that a riparian owner has right to use water as long as it does not materially interfere with downstream first-in-time use).

19. Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 576–77, 21 P. 27, 29 (Wash. Terr. 1889) (noting that perfection of a water right is determined by community custom, and requires an intent to appropriate and actual appropriation for beneficial use).

20. *Geddis v. Parrish*, 1 Wash. 587, 21 P. 314 (1889); Benton v. Johncox, 17 Wash. 277, 279–81, 49 P. 495, 496 (Wash. 1897).

21. City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 502, 64 P. 735 (1901).

22. Dep’t of Ecology v. Grimes, 121 Wash. 2d 459, 471–73, 852 P.2d 1044, 1051–52 (1993) (finding that unreasonably high conveyance loss was not a beneficial use, water right reduced accordingly); *see also* R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wash. 2d 118, 127–128, 969 P.2d 458, 463–64 (1999).

23. *See* JOHN W. JOHNSON, UNITED STATES WATER LAW, AN INTRODUCTION 52 (2009).

correlative rights of water users under the riparian doctrine.²⁴

The state legislature first attempted to develop a comprehensive system for water appropriation in 1890 with the Irrigation and Irrigating Ditches Act.²⁵ In 1891 the legislature added a requirement that water users post notice of intent to appropriate.²⁶ The legislature further provided that the priority date of a water right would relate back to the posting of notice.²⁷ In *Benton v. Johncox*, however, the Washington State Supreme Court expressly upheld the common law riparian doctrine.²⁸ The *Benton* Court, in fact, called into question whether states have the power to eliminate riparian rights at all, suggesting that such rights are an inseparable incident to ownership of land.²⁹ The Court held that prior appropriation applied to public land, as acknowledged by certain provisions of the 1866 Mining Act, but that when the federal government transferred title to a private party without reserving the water rights, the riparian rights passed to the owner of the property.³⁰

A statewide lobbying effort by irrigators finally resulted in a comprehensive surface water code in 1917.³¹ The 1917 Water Code established a permitting system for new water rights, mechanisms for adjudication, and principles of beneficial use, and empowered the State to permit and regulate water rights.³² Since 1917, any party wishing to make a new use of surface water must apply for a permit from the State.³³ The statute provides no exceptions.³⁴

Groundwater continued to be governed separately from surface water by common law until 1945.³⁵ “Underground streams” were governed by

24. *Geddis*, 1 Wash. at 591, 21 P. at 315.

25. Washington Irrigation and Irrigating Ditches Act (1890) (any person entitled to take water not already appropriated). Some territorial laws also favored prior appropriation. See 18 WASH. TERR. LAWS, 520–22 (1873) (granting right to appropriate water for beneficial use in Yakima County).

26. 1891 WASH. LAWS, 327–29 (1891).

27. *Id.*

28. *Benton v. Johncox*, 17 Wash. 277, 281, 49 P. 495, 496 (1897).

29. *Id.*

30. *Id.* at 289–90, 49 P. at 499 (citing *Jennison v. Kirk*, 98 U.S. 456, 457 (1878); Act of July 26, 1866, 14 Stat. 253 § 9). The Court’s reasoning in *Benton* is expressly rebuked by the United States Supreme Court in *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). *Cal. Or. Power* also affirms the authority of the State in enacting later statutes that establish prior appropriation as the dominant water rights system in Washington.

31. E.K. Vandever, *History of Irrigation in Washington* (1948) (unpublished Ph.D. dissertation, University of Washington) (*on file with Journal*).

32. 1917 WASH. LAWS, Ch. 117 (codified at WASH. REV. CODE § 90.03 (2012)).

33. WASH. REV. CODE § 90.03.250 (2012).

34. *Id.*

35. GREGOIRE, *supra* note 16, at V:4 to V:7.

the same principles as surface waters, and “percolating” groundwater was governed by common law.³⁶ Presumably, this meant that after 1917, the provisions of the Water Code would apply to underground streams, and any user would be required to comply with permitting and claims registration processes. In *Evans v. City of Seattle*, however, the Washington State Supreme Court defined an “underground stream” as one that flows in a permanent, defined, and well-known channel.³⁷ The Court further established a presumption that groundwater was “percolating” rather than classifying it as an “underground stream.”³⁸ The burden for rebutting this presumption (by clear and convincing evidence) was essentially impossible to meet because the terms did not have any connection to hydrologic reality; “underground streams,” as contemplated by the court, do not exist.³⁹

In 1945, the state legislature passed a groundwater code that extended the 1917 Water Code’s permit system to groundwater.⁴⁰ The permitting requirement provides:

After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided:

EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.050, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter⁴¹

36. *Evans v. City of Seattle*, 182 Wash. 450, 453, 47 P.2d 984, 985 (1935) (citing *Meyer v. Tacoma Light & Water Co.*, 35 P. 601, 8 Wash. 144 (1894)). The concept of underground streams really stems from a misunderstanding of hydrogeology in the early twentieth century. Except in areas of limestone karst topography, which do not exist in Washington, water generally does not flow underground in “streams.” GREGOIRE, *supra* note 16, at V:5.

37. *Evans*, 182 Wash. at 453, 47 P.2d at 985.

38. *Id.*

39. GREGOIRE, *supra* note 16, at V:5.

40. 1945 WASH. LAWS ch. 263 (codified at WASH. REV. CODE § 90.44 (2012)); WASH. REV. CODE § 90.44.020 (2012) (intent of statute is to extend application of surface water statutes to groundwater).

41. WASH. REV. CODE § 90.44.050.

The groundwater code excepts four significant classes of groundwater use from permitting requirements: (1) stock watering, (2) watering a lawn or noncommercial garden not exceeding one-half acre in area, (3) single or group domestic use not exceeding 5000 gallons per day, and (4) industrial purposes not exceeding 5000 gallons per day.⁴² Though exempt from permitting, these excepted uses are still subject to all other substantive provisions of the groundwater code, including both the beneficial use requirement and the priority system.⁴³ The stock watering exemption is not limited as to quantity: any stock water use is eligible for the exemption.⁴⁴ Watering a lawn or garden not exceeding one half acre also technically has no volume limitation.⁴⁵ Single or group domestic use and industrial use are both limited to 5000 gallons per day.⁴⁶

The exemptions were practical ones, intended to save water users from the difficulty and expense of complying with permitting procedures and to save the state from the difficulty and expense of processing applications for small withdrawals that were likely to have only de minimus impact.⁴⁷ Exempt well use today is cumulatively very significant. In the last few decades, suburban and ex-urban development has expanded into rural unincorporated areas, and developers have utilized the “single or group domestic” use exemption to provide water for a significant portion of the State’s residential growth.⁴⁸ Hundreds of thousands of acre-feet are withdrawn each year from exempt wells,⁴⁹ posing significant problems for Ecology in administering the State’s waters, as well as potentially threatening critical in-stream flows in some basins.⁵⁰

42. *Id.*

43. See WASH. REV. CODE §§ 90.44.035, 110, 130 (2012).

44. *Five Corners Family Farmers v. Washington*, 173 Wash. 2d 296, 313, 286 P.3d 892, 901 (2012).

45. See *id.* (exempt use categories are limited only by the qualifying phrase following the category); WASH. REV. CODE § 90.44.050 (2012). Because exempt well use is limited by beneficial use and prohibitions on waste, it is not conceivable that use of more than 5000 gallons per day would be allowable for a half acre lawn or garden.

46. See *Five Corners Family Farmers*, 173 Wash. 2d at 313, 268 P.3d at 901; WASH. REV. CODE § 90.44.050 (2012).

47. See Robert N. Caldwell, *Six-Packs for Subdivisions: The Cumulative Effects of Washington’s Domestic Well Exemption*, 28 ENVTL. L. 1099, 1103 (1998).

48. *Id.* at 1105–07.

49. An acre-foot is the typical measurement of large volumes of water in the United States. It is the volume required to cover one acre of land with one foot of water. One acre-foot equals approximately 325,853 gallons.

50. Caldwell, *supra* note 47, at 1108–10.

III. THE USE OF EXEMPT WELLS IN SUBDIVISIONS

The exempt well provision provides an attractive option for developers to avoid the cost and delay of the water rights permitting process, as well as the higher regulatory scrutiny of an officially recorded right. Consequently, between the 1980s and early 2000s developers commonly used either the individual domestic exemption by drilling a single exempt well for each parcel within a development or the group domestic exemption by creating “Group B” water systems.⁵¹ Group B is a classification of public water systems governed by Washington Department of Health regulations in which a single domestic well may be drilled to serve six residences (three residences for wells east of the Cascade Mountains).⁵² In 1997, the Attorney General opined that this use of exempt wells was unlawful,⁵³ and in 2002 the Washington State Supreme Court agreed.⁵⁴

A. Dep’t of Ecology v. Campbell & Gwinn, LLC

In 1999, Campbell & Gwinn, LLC notified Ecology that it intended to drill permit-exempt wells on twenty individual lots it owned in Yakima County near Ahtanum Creek. An Ecology employee who reviewed the notice believed that the twenty lots were part of one project. That employee was concerned that drilling exempt wells as proposed would be inconsistent with a 1997 Attorney General’s opinion, taking the position that all water use within a subdivision constituted one withdrawal for the purposes of RCW 90.44.050, and therefore the permit exemption did not apply to total subdivision use exceeding 5000 gallons per day.⁵⁵ Ecology employees relayed these concerns to Campbell & Gwinn, and the parties agreed to submit the issue to the Yakima County Superior Court as a declaratory judgment action. On cross-motions for summary judgment, the court ruled in favor of Campbell & Gwinn, finding that “[w]ithdrawals from multiple wells within a subdivision, if each withdrawal is less than 5000 gallons per day, are multiple withdrawals, not a single withdrawal. Each 5000 gallon per day withdrawal is exempt from the permit requirement of RCW

51. *Id.* at 1106.

52. *Id.* (citing WASH. DEPT. OF HEALTH, WASH. ADMIN. CODE § 246–291 (1997)). The number of residences served is apparently based on the 5000 gallon per day limit. *Id.*

53. Status in Water Rights System of Exempt Groundwater Withdrawals, 6 Op. Wash. Att’y Gen. 1 (1997).

54. Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wash. 2d 1, 13–14, 43 P.3d 4, 11 (Wash. 2002).

55. *Id.* at 5, 43 P.3d at 7; see 6 Op. Wash. Att’y Gen. 1, *supra* note 53.

90.44.050.”⁵⁶

On appeal, the Washington State Supreme Court held that a developer cannot utilize exempt wells where proposed water use for an entire subdivision will exceed 5000 gallons per day.⁵⁷ The Court stated that by the plain meaning of the exempt well statute, the 5000 gallon per day limit applies to the use proposed by the permit applicant and not to the amount withdrawn from each individual well.⁵⁸ In this case, the developer was the permit applicant, not the individual lot owner, so the total proposed water use of the project was the relevant metric for determining whether an exemption applied regardless of the number of proposed wells.⁵⁹

Campbell & Gwinn did not expressly establish any requirement for counties to determine legal water availability,⁶⁰ leaving counties to fill the gaps between the Court’s holding and developers’ interpretation of the statute. County regulations could not allow permittees to violate the clear mandate of the case by using multiple exempt wells to provide water for a single subdivision. However, the Court did not definitively decide what constituted a single subdivision, so the question remained open whether counties were required to prevent developers from otherwise evading permit requirements. *Campbell & Gwinn* was silent on whether counties have a broader duty to ensure that water is legally available; the Court later addressed these questions in *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*

The Court’s holding in *Campbell & Gwinn* ended the practice of using multiple exempt wells to supply subdivisions. Developers quickly came up with a novel approach for skirting the statutory limitation; this was the key issue considered by the court in *Kittitas County*. Following *Campbell & Gwinn*, developers began submitting separate subdivision applications to counties for many small subdivisions, which in reality were part of single large subdivisions. By keeping the proposed water use associated with each individual subdivision application below the 5000 gallon per day limit, developers could argue they were complying with the law.

56. *Id.* at 7, 43 P.3d at 8 (quoting summary judgment order) (internal quotations omitted).

57. *Id.* at 14, 43 P.3d at 11.

58. *Id.* at 12, 43 P.3d at 10.

59. *Id.* at 14, 43 P.3d at 11.

60. *See generally id.* at 13–17, 43 P.3d at 11–13.

B. *Procedural Background: Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*

Kittitas County's 2006 subdivision regulations allowed property owners to submit subdivision applications without submitting information about related subdivision applications, essentially allowing a property owner to evade water right permitting requirements.⁶¹ Despite the Court's holding in *Campbell & Gwinn*,⁶² a developer could use multiple subdivision applications to allow what was really one subdivision to be served by multiple exempt wells, each using less than 5000 gallons of water per day.

Several organizations, including Kittitas County Conservation, RIDGE, and Futurewise (collectively "RIDGE") petitioned the Eastern Washington Growth Management Hearings Board (Board) to review Kittitas County's Revised 2006 Comprehensive Plan.⁶³ The petitioners alleged that the comprehensive plan violated several requirements of the state's Growth Management Act (GMA or "the Act"), including that the County's subdivision regulations allowed multiple exempt wells to serve single subdivisions in violation of the GMA's mandate to protect water resources.⁶⁴ The Board found that Kittitas County's revised comprehensive plan did not comply with the GMA because it allowed permit applicants to use multiple exempt wells to serve single subdivisions by separating the subdivision into multiple applications in violation of state water law.⁶⁵ Kittitas County and several other parties separately appealed the Board's decisions.⁶⁶ Division Three of the Washington Court of Appeals consolidated the two cases and certified them for review by the Washington State Supreme Court.⁶⁷ The State Supreme Court affirmed the Board's decision, holding that Kittitas County's subdivision regulations failed to protect water resources as

61. See KITTITAS COUNTY CODE § 16.04.040 (2007), *amended by* Kittitas County Ordinance 2010-001 (Feb. 11, 2013); *id.* § 16.12.020 (2007), *amended by* Kittitas County Ordinance 2010-014 (Dec. 21, 2010).

62. *Campbell & Gwinn, LLC*, 146 Wash. 2d at 14, 43 P.3d at 11.

63. *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wash. 2d 144, 152, 256 P.3d 1193, 1197 (2011).

64. *Kittitas Cnty. Conservation v. Kittitas Cnty.*, No. 07-1-0015, 2008 WL 1766717, 1 (E. Wash. Growth Mgmt. Hearings Bd. March 21, 2008).

65. *Id.* at 9.

66. *Kittitas Cnty.*, 172 Wash. 2d at 151, 256 P.3d at 1196.

67. *Id.* at 152, 256 P.3d at 1197. The Board also decided several other issues relating to Kittitas County's comprehensive plan, and the Court considered eight issues raised by petitioners concerning the Board's decision. This Comment examines only the impact of the Court's decision on the eighth issue, whether "the Board properly determined that the County failed to protect water by not requiring disclosure of common ownership in subdivision applications."

required by the GMA because the regulations allowed permit applicants to evade water rights permitting requirements.⁶⁸

IV. COUNTY ZONING REGULATIONS MUST NOT ALLOW MULTIPLE SUBDIVISION APPLICATIONS FOR ADJACENT COMMONLY OWNED PROPERTY

A. *The Growth Management Act Requires Water Resource Protection*

The GMA directs counties to ensure adequate water supply by requiring that building permit applicants provide evidence of an “adequate water supply for the intended use of the building.”⁶⁹ The GMA further requires that the mandatory land use element of a county’s comprehensive plan must provide for protection of surface and groundwater resources.⁷⁰ Of particular importance in *Kittitas County* is the GMA requirement that building permit applicants submit evidence of adequate water supply,⁷¹ and the requirement that a city or county enforce the provision and ensure that water supply is adequate before issuing a permit.⁷² With regard to subdivisions, the Court quoted RCW 58.17.110(2): “A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) appropriate provisions are made for . . . potable water supplies.”⁷³ Counties have interpreted these mandates to require only that they verify that water is physically available in the ground and deny any responsibility to determine the legal adequacy of a proposed source of water, suggesting that this determination falls to the Department of Ecology.⁷⁴

B. *The GMA Requires County Subdivision Regulations to Prevent Evasion of Water Law by Permit Applicants*

The Court in *Kittitas County* upheld the Board’s finding that the County’s subdivision regulations allowing multiple side-by-side subdivisions in common ownership were not in compliance with the

68. *Id.* at 175–76, 256 P.3d at 1208.

69. WASH. REV. CODE § 19.27.097(1) (2012).

70. *Id.* §§ 36.70A.070(1), (5)(c)(iv).

71. *Id.* § 19.27.097(1) (2012).

72. *Kittitas Cnty.*, 172 Wash. 2d at 178–79, 256 P.3d at 1209 (citing *Swinomish Indian Tribal Cmty. v. Skagit Cnty.*, 138 Wash. App. 771, 780, 158 P.3d 1179, 1183 (2007)); WASH. REV. CODE § 58.17.110 (2012).

73. *Kittitas Cnty.*, 172 Wash. 2d at 179, 256 P.3d at 1209 (quoting WASH. REV. CODE § 58.17.110(2)(2012)).

74. *Id.* at 179–80, 256 P.3d at 1210; *see also* Reinert, *supra* note 14.

GMA's mandate to protect water quantity.⁷⁵ The Board reasoned that the subdivision regulations were out of compliance with the GMA because they allowed subdivision applicants to evade water rights permitting requirements.⁷⁶ The Court echoed this reasoning, adding that "[i]n effect, the County could approve the subdivision of land, relying on the availability of permit-exempt wells for water supply, under circumstances in which *Campbell & Gwinn* would actually require water permits from Ecology under RCW 90.44.050."⁷⁷ The Court held that RCW 58.17.110 requires that county subdivision regulations consider multiple side-by-side subdivision applications covering commonly owned property together.⁷⁸

The Court rejected petitioner's argument that a county is preempted from adopting regulations relating to groundwater,⁷⁹ holding that while Ecology was the only agency that could appropriate water,⁸⁰ counties could and must regulate to ensure that land use is "not inconsistent with available water resources."⁸¹ Furthermore, the Court framed the question as whether RCW 58.17.110, in requiring that counties assure appropriate provisions are made for potable water supplies, only intends that counties must assure that water is factually available underground or that water is both factually and legally available.⁸² The Court made clear that a county has a role beyond simply determining that water is physically underground and implied that a county does have a duty to determine whether water is legally available before issuing permits.⁸³

V. IMPLICATION OF *KITTITAS COUNTY* HOLDING BEYOND RCW 58.17.110: COUNTIES MUST CONSIDER GMA WATER PROTECTION PROVISIONS IN LIGHT OF RELATED WATER CODE PROVISIONS

The *Kittitas County* Court articulated a rule that county zoning regulations may not allow subdivision permit applicants to "effectively evade compliance with water permitting requirements."⁸⁴ At least one commentator suggests that all that we know for sure as a result of

75. *Kittitas Cnty.*, 172 Wash.2d at 181, 256 P.3d at 1210.

76. *Kittitas Cnty. Conservation v. Kittitas Cnty.*, No. 07-1-0015, 2008 WL 1766717, 17-19 (E. Wash. Growth Mgmt. Hearings Bd. March 21, 2008).

77. *Kittitas Cnty.*, 172 Wash. 2d at 177, 256 P.3d at 1209.

78. *Id.* at 180-81, 256 P.3d at 1210.

79. *Id.* at 179, 256 P.3d at 1209-10.

80. *Id.* at 178, 256 P.3d at 1209 (citing WASH. REV. CODE § 90.44.040 (2012)).

81. *Id.*

82. *Id.* at 180, 256 P.3d at 1210.

83. *Id.*

84. *Id.* at 181, 256 P.3d at 1210.

Campbell & Gwinn and *Kittitas County* is that “counties cannot allow applicants to effectively evade water permitting requirements, such as by [filing] multiple, essentially related subdivision applications.”⁸⁵ Several others suggest that the case requires counties to determine whether water is legally available,⁸⁶ though there has been relatively little elaboration on the meaning of this requirement.⁸⁷ In context, the Court’s statement can fairly be interpreted as establishing that counties have an affirmative duty to ensure that subdivision permit applicants, as well as other applicants for building developments, comply with water permitting requirements.

The Court, when asked whether counties must determine legal and factual availability of water, decided that interpreting the GMA as requiring counties only to determine whether water was physically available would allow evasion of the law.⁸⁸ This framing strongly supports the argument that counties must determine legal availability, at least in the context of determining whether “appropriate provisions are made for . . . potable water supplies” by subdivision permit applicants.⁸⁹ Additionally, the GMA requires all building permit applicants to submit proof of an adequate water supply,⁹⁰ making it likely that the Court would extend this rationale beyond subdivision permits.

The debate over whether counties are charged with determination of legal water availability following *Kittitas County* is largely an academic one. Regardless of what it is called, the Court made clear that counties must prevent subdivision permit applicants from evading water rights permitting requirements.⁹¹ There is little reason to suggest that the Court would not extend its reasoning to other types of development. Consequently, counties must look to related water code provisions to ensure that every subdivision permit applicant has legal access to an

85. Reinert, *supra* note 14, at 2.

86. See Jeff Kray, *Washington Supreme Court Restricts Water Rights—Decision May Impede Development in Rural Counties*, MARTEN L. NEWSL. (Oct. 13, 2011), available at <http://www.martenlaw.com/newsletter/20111013-wash-water-rights-restricted>; EarthJustice Letter, *supra* note 13, at 5; Dan Patridge, *Court Decision is Big Gain for Groundwater Protection*, WASH. DEP’T OF ECOLOGY BLOG (Aug. 18, 2011), <http://ecologywa.blogspot.com/2011/08/court-decision-is-big-gain-for.html> (Water Resources Program Manager Maia Bellon suggests counties were obligated to determine “legal availability” even before the Court’s decision.).

87. EarthJustice argues in its letter to King County department directors that when a permit applicant intends to utilize exempt wells for a development, it is the County’s duty to independently determine water availability because Ecology has no regulatory role before an exempt well is drilled. EarthJustice Letter, *supra* note 13, at 6.

88. *Kittitas Cnty.*, 172 Wash. 2d at 181, 256 P.3d at 1210.

89. WASH. REV. CODE § 58.17.110(2) (2012).

90. *Id.* § 19.27.097(1).

91. *Kittitas Cnty.*, 172 Wash. 2d at 179–81, 256 P.3d at 1209–10.

adequate water source.

VI. COUNTIES ARE CAPABLE OF ADEQUATELY DETERMINING THE LEGAL AVAILABILITY OF WATER

Ensuring that a legally adequate water source is available is not an onerous task for a county to undertake. Presently, most counties are equipped to determine legal water availability when an applicant seeks to use permitted ground or surface water. Proof of the legal validity of such water rights is adequate when an applicant provides evidence of a valid claim, permit, certificate of adjudication or water right, or statement from a water purveyor that water will be provided.⁹² In fact, counties presumably are already partially fulfilling this obligation by complying with the express requirements of the GMA.⁹³ Where an applicant plans to use an exempt well for water supply, the county's responsibility is less certain. A county must first require proof that the applicant will meet the use and quantity requirements for a permit exemption, and second must determine that a proposed use will not impair existing rights. County authority to evaluate the priority of water rights is limited. Accordingly, cooperation between counties and Ecology will be necessary to determine if water in a particular basin is freely available for exempt well appropriation. However, this process is not as difficult as it may appear.

A. *Counties are Presently Equipped to Determine Whether an Applicant has a Permitted Surface and Groundwater Right*

Ensuring that permit applicants have access to a legal water source is relatively straightforward in situations where the permitted action will require a permitted surface or groundwater right. In such a case, the county will only need proof of a valid right. A valid right can be shown, depending on the specific circumstance, by a certificate of adjudicated water right, a properly registered claim, a permit, or a water right certificate.⁹⁴ A statement from a water purveyor (who has a valid right) stating that water will be provided would also be sufficient.⁹⁵

The Water Code sets forth a process for determining the validity of

92. See *infra* notes 94–104 and accompanying text.

93. See WASH. REV. CODE. § 19.27.097(1) (2012).

94. *Id.* § 90.03.250 (certificate of adjudication); *id.* §§ 90.14.041–.121 (claims); *id.* § 90.03.250 (permits); *id.* § 90.03.330 (certificate).

95. *Id.* § 19.27.097(1).

pre-1917 claims through adjudication.⁹⁶ Following final adjudication by the court, Ecology will issue a certificate of water right which sets out all of the attributes of the right, including place, purpose, quantity, and season of use.⁹⁷ Where a basin has not been adjudicated, a pre-1917 surface water right or pre-1944 groundwater right may be supported by a claim. Users claiming pre-1917 surface water rights or pre-1944 groundwater rights must have properly filed a claim for registration before June 30, 1974.⁹⁸ The actual validity of a claim can only be determined by adjudication.⁹⁹ Accordingly, if a claim was properly registered, and has not subsequently been adjudicated, the claim will be sufficient for a county's purposes.

Surface water appropriations made after the Surface Water Code was passed in 1917 and groundwater appropriations made after June 6, 1945 are both subject to the permitting process.¹⁰⁰ Under the Water Codes, a person wishing to appropriate water must submit an application to Ecology, providing detailed information about the proposed purpose of use, place of use, and quantity of use.¹⁰¹ Ecology may issue a permit if it finds that water is available for appropriation and that the proposed use meets the other statutory requirements.¹⁰² When a permit holder adequately shows that the right has been perfected, Ecology will issue a water right certificate.¹⁰³

B. *Minor Changes can Allow Counties to Evaluate the Legality of Proposed Exempt Well Use*

The task of determining whether a permit applicant has access to a legal water source becomes more complicated when the applicant proposes to use an exempt well. *Kittitas County* appears to require that counties ensure permit applicants proposing to use exempt wells will actually meet the legal requirements for permit exemption.¹⁰⁴ Water is legally available for permit-exempt use only when the use actually fits

96. *See id.* §§ 90.03.110–.240.

97. *Id.* § 90.03.240.

98. *Id.* §§ 90.03.241, 243.

99. *Rettkowski v. Dep't of Ecology*, 122 Wash.2d 219, 225, 858 P.2d 232, 235 (1993) (finding that Ecology did not have authority to determine and enforce priority of rights absent adjudication by the Superior Court).

100. WASH. REV. CODE §§ 90.03.250, 90.44.050.

101. *Id.* § 90.03.260.

102. *Id.* § 90.03.290. Other statutory conditions require Ecology to determine if the land is irrigable, that the water will be beneficially used, and that, if the appropriation is proposed for power production, it will be in the public interest. *Id.*

103. *Id.* at § 90.03.330.

104. *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wash. 2d 144, 180–81, 256 P.3d 1193, 1210 (2011).

within one of the four discrete categories listed in RCW 90.44.050 and when appropriation will not impair a senior use.¹⁰⁵ As illustrated in *Campbell & Gwinn* and *Kittitas County*, the 5000 gallon per day limitation applies to the entire use of a single subdivision.¹⁰⁶ A county may not allow evasion of this rule by permitting applicants to file multiple applications for what is really one subdivision.¹⁰⁷

Counties do not have the authority to determine or enforce the priority of water rights; that power is exclusive to the judiciary.¹⁰⁸ Ecology, however, has the authority to close basins to new withdrawals, including new permit exempt wells.¹⁰⁹ This authority is granted by statute only to Ecology; counties do not have the authority to determine if a basin should be closed to withdrawals. Despite this, it is probably not sufficient for a county to stop after making a determination that an applicant will fit within one of the legal categories for exemption. Permitting development using a new water source in a closed basin would allow evasion of state water law and therefore would be inconsistent with the Court's holding in *Kittitas County*. A county must ensure both that an applicant will meet the use and quantity requirements for a permit exemption and, to the extent it has authority to do so, ensure new exempt well use will not impair senior users or protected stream flow.

A county planning department could meet its GMA obligations simply by ensuring that an applicant proposing to use an exempt well meets the appropriate use requirements and then inquiring of Ecology whether the basin in which the new use is proposed is "closed." If the basin is "closed," proof of sufficient mitigation water would serve as conclusive evidence that a legally adequate water supply is available without the need for the county to independently determine whether impairment of existing uses is likely. Water mitigation banking

105. See *supra* notes 41–46 and accompanying text. The State Groundwater Code exempts four types of water use from water right permitting requirements: (1) stock watering; (2) watering a lawn or noncommercial garden not exceeding one-half acre in area; (3) single or group domestic use not exceeding 5000 gallons per day; and (4) industrial purposes not exceeding 5000 gallons per day. *Five Corners Family Farmers v. Washington*, 173 Wash. 2d 296, 313, 268 P.3d 892, 901 (2011) (under plain meaning of the statute, stock watering exemption is not limited). WASH. REV. CODE § 90.44.050 (2012). Permit-exempt groundwater use is, however, still subject to all of the same rights and privileges as permitted water use, including limitation based on priority date. *Id.*

106. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 10, 43 P.3d 4, 11 (2002). See generally *Kittitas Cnty.*, 172 Wash.2d 144, 256 P.3d 1193.

107. *Kittitas Cnty.*, 172 Wash.2d at 181, 256 P.3d at 1210.

108. See *Rettkowski v. Dep't of Ecology*, 122 Wash.2d 219, 225, 858 P.2d 232, 235 (1993).

109. WASH. REV. CODE § 90.54.050 (2012).

programs, which create a structured system for purchasing existing water rights that will be left in stream to offset new water uses, are already being established around the state for basins that are closed to new withdrawals and basins that may be closed in the future.¹¹⁰ Creating and administering mitigation banks is complex and still evolving. The details of the process are beyond the scope of this Comment.¹¹¹ It is important here that the apparent regulatory structure following *Kittitas County* will allow Ecology to determine whether to close basins and for Ecology or some other expert entity to handle the details of administering mitigation banks, while the counties will be responsible for ensuring compliance by adding a small step to an existing permitting process.

VII. CONCLUSION

Washington allocates water through a permitting system that is based on the principle of prior appropriation. Like most prior appropriation states, Washington provides an exemption from permitting requirements for certain small groundwater uses, including domestic use.¹¹² Individually, exempt domestic wells are a de minimus contribution to total water use in most basins, but cumulative use of the exemption has the potential to be significant. Cumulative use of exempt wells poses a particularly acute and imminent threat to senior water rights and protected stream flows in certain arid parts of the state with significant ex-urban and suburban development.

The Washington State Supreme Court's decisions in *Campbell & Gwinn* and *Kittitas County*, have interpreted the domestic exemption narrowly, making clear that exempt wells cannot be used to supply water for subdivisions where the total use of the subdivision will exceed the daily limit of 5000 gallons.¹¹³ In *Kittitas County*, the Court further held that counties may not allow "subdivision applications that effectively

110. The process for setting up mitigation banks is complicated and somewhat controversial, and detailed discussion is beyond the scope of this comment. It is sufficient here to note that some form of mitigation banking does appear to be the model for dealing with basins closed to new withdrawals in Washington. For a discussion of mitigation banking, see generally Laura Ziemer & Ada Montague, *Can Mitigation Water Banking Play a Role in Montana's Exempt Well Management?*, WPIC BRIEFING PAPER (TROUT UNLIMITED) (Sept. 18, 2011), available at <http://leg.mt.gov/content/Committees/Interim/2011-2012/Water-Policy/Meeting-Documents/September-2011/mitigation-banking-tu.pdf>.

111. For a discussion of mitigation banking in basins within Kittitas and Walla Walla counties see *id.*

112. WASH. REV. CODE § 90.44.050 (2012).

113. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash. 2d 1, 14, 43 P.3d 4, 11, (Wash. 2002); *Kittitas Cnty. v. E. Wash. Growth Mgmt. Bd.*, 172 Wash. 2d 144, 177–78, 256 P.3d 1193, 1209 (2011).

evade compliance with water permitting requirements.”¹¹⁴ The Court left little doubt that counties have an affirmative duty to ensure that applicants seeking permits to build or develop land have a legally adequate supply of water available.¹¹⁵

Requiring counties to ensure the legal adequacy of a proposed water source when permitting development may provide a means to effectively regulate exempt wells where their cumulative impact is significant. The answer to whether counties are equipped to make this determination is surprisingly simple. Counties can very easily determine the legal adequacy of a proposed water source where an applicant intends to use permitted surface or groundwater.¹¹⁶ Where an applicant proposes to use an exempt well, a county simply must ensure that the applicant meets statutory use and quantity requirements and that water use will not impair existing uses. A county may determine that existing uses will not be impaired if the basin where the water use is proposed has not been closed to new withdrawals by Ecology, or if the basin has been closed, that the applicant has acquired sufficient mitigation credits to offset the new water use.¹¹⁷ This is a relatively efficient solution that eliminates the need for either the state regulatory agency to add enforcement staff or for counties to develop the appropriate expertise and add staff to evaluate the technical and legal details of a proposed water source. If this method of regulating is successful in Washington, it could serve as a model for addressing the very similar issues existing throughout the West.

114. *Kittitas Cnty.*, 172 Wash. 2d at 181, 256 P.3d at 1210 (citing WASH. REV. CODE § 58.17.110(2) (2012)).

115. *Id.* at 179–81, 256 P.3d at 1209–10.

116. *See supra* notes 94–104 and accompanying text.

117. *See supra* notes 105–112 and accompanying text.